No. 806. 93 & 94

Brief of Wheeler for Oppn

Filed Dec. 16, 1893.

Supreme Court of the United States.

CLIMACO CALDERON,
Libellant-Appellant,

vs.

THE ATLAS STEAMSHIP COMPANY
(Limited),
Respondent-Appellee.

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Brief for Respondent in Opposition to Motion for Certiorari.

Statement.

The libel alleges (p. 2, fol. 7) the delivery of twenty-seven bales and three crates of duck uniforms to the Atlas S. S. Co., and that libellant "received therefor three bills of lading, receipts and contracts, all of like tenor and date, whereof a copy is hereto annexed, marked A."

The bill of lading was put in evidence by libellant (p. 14, fol. 55).

The steamer sailed July 19, 1893 (p. 33, fol. 129). The goods were delivered between eleven and twelve o'clock of that day. They arrived too late to be put with the

other Savanilla cargo. "It was just the last minute. * * * They were the last goods put in" (p. 35, fols. 137-140).

On the delivery of the goods a receipt for them was given "subject to the conditions expressed in the company's form of bill of lading" (p. 43, fol. 169). Libellant received the bills of lading "not later than one o'clock, and forwarded them by the same steamer" (p. 34, fol. 133).

Libellant had shipped goods, at least, ten times on similar bills of lading (pp. 21, 22, fols. 84, 85).

The Atlas steamers had been running on the same route to Carthagena and Savanilla, and on the same schedule for about three years (p. 21, fol. 82). The usual course of that route was "first to Kingston, then to Savanilla, then to Carthagena and Port Limon, and then back to New York direct" (p. 21, fols. 81, 82; p. 15, fol. 59). On that route the steamers carry cargo, passengers, specie and mails (p. 21, fol. 82).

The mistake in not delivering the cases of uniforms at Savanilla was not discovered until the steamer had left that port, and about an hour before the discharge of Carthagena cargo (p. 16, fol. 62; p. 18, fol. 71 and 72; p 19, fol. 74). The cause of the mistake was that the cases had been "stowed amongst the Carthagena cargo" (p. 16, fol. 63; p. 18, fol. 71).

The cargo could not be landed at Carthagena because the law there does not allow the landing of cargo not on the manifests, and it was impracticable to forward the goods from there (pp. 16, 17, fols. 64, 65). The steamer could not return to Savanilla, because she was "timed to be at Limon at a certain day to take up a perishable cargo that was waiting" (p. 17, fol. 66).

The steamers have regular sailing days from these different ports. The return cargo at that season from

Port Limon is bananas, and punctuality in sailing on the schedule time is, therefore, essential (p. 25, fols. 98, 99).

POINTS.

First.

The case is not one in which, under the well settled practice of this Court, a certiorari should issue. The rule on this subject is clearly stated in American Construction Co. *vs.* Jacksonville, &c., Railway Co., 148 U. S., 372. At page 382 the Court say :

"The Act has uniformly been so construed and applied by this Court as to promote its general purpose of lessening the burden of litigation in this Court, transferring the appellate jurisdiction in large classes of cases to the Circuit Court of Appeals, and making the judgment of that Court final, except in extraordinary cases."

The case at bar is not extraordinary. It involves a controversy between a shipper and a carrier as to the latter's liability for loss of cargo. Such suits are frequent. They mainly involve, as does this, either the application of well settled rules of law or questions of fact. They arise frequently ; but no more frequently than all questions under bills of lading, negotiable paper and other commercial contracts. In short, every argument that can be presented for a review on certiorari of the decision in this case would apply to all questions arising under such contracts. In one sense they are important. Congress endeavored to provide at the

beginning of the Government one central tribunal which should, in the last resort, decide them all. So many cases, however, arose in which the exercise of this jurisdiction was invoked, that it broke down under its own weight, and therefore the act of March 3, 1891, Chapter 517, was passed. Of this Act this Court say:

American Construction Co. *vs.* Jacksonville, &c., Railway Co., 148 U. S., 372, 382.

"The primary object of this Act, well known as a matter of public history, manifest on the face of the act, and judicially declared in the leading cases under it, was to relieve this Court of the overburden of cases and controversies, arising from the rapid growth of the country, and the steady increase of litigation; and, for the accomplishment of this object, to transfer a large part of its appellate jurisdiction to the Circuit Courts of Appeals thereby established in each judicial circuit, and to distribute between this Court and those, according to the scheme of the Act, the entire appellate jurisdiction from the Circuit and District Courts of the United States. McLish *vs.* Roff, 141 U. S., 661, 666, 894; Re Lau Ow Bew, 141, U. S., 583 and 144 U. S., 47.

Second.

The case in the Court below turned wholly upon the construction of particular clauses in a bill of lading. No general question of law was involved.

It is well settled that a clause in a bill of lading, limiting the amount of the recovery to $100 per package, is valid.

Hart *vs.* Pennsylvania R. R., 112 U. S., 331.

At page 340, the Court say:

"There is no justice in allowing the shipper to be paid a large value for an article which he has induced the carrier to take, at a low rate of freight, on the assertion and agreement that its value is a less sum than that claimed after a loss. It is just to hold the shipper to his agreement, fairly made, as to value, even where the loss or injury has occurred through the negligence of the carrier. The effect of the agreement is to cheapen the freight and secure the carriage, if there is no loss; and the effect of disregarding the agreement, after a loss, is to expose the carrier to a greater risk than the parties intended he should assume. The agreement as to value in this case stands as if the carrier had asked the value of the horses, and had been told by the plaintiff the sum inserted in the contract."

In this case there was no definite valuation of the horses in question. The clause in controversy read:

"The carrier assumes a liability on the stock to the extent of the following agreed valuation:

"If horses or mules, not exceeding $200 each."

This could not be called a valuation of a particular horse. It fixed nothing but the limit of liability. The carrier could have proved that the animal was worth less than the amount stated.

Muser *vs.* Holland, 17 Blatch., 412.

At p. 414 Mr. Justice WALLACE says:

"The right of a carrier to exact fair information as to the value of property confided to his care has always been recognized. He has the right to insist that his compensation be measured by his risk, and, obviously, the degree of care which he will exercise will measurably depend upon the extent of the responsibility he may incur. While it is not primarily the duty of the shipper to inform the carrier of the nature or value of the contents of the parcel sent, the carrier has the right to make inquiry and receive a true answer; and any

concealment on the part of the shipper, intended to mislead the carrier as to the character or value of the property, and which does mislead, is a fraud, which absolves the carrier from responsibility."

To the same effect are :

Ernest *vs.* Express Co., 1 Woods, 573.
Hopkins *vs.* Westcott, 6 Blatch., 64.
Kidd *vs.* Greenwich Ins. Co., 35 Fed. Rep., 351.
The Bermuda, 29 Fed. Rep., 399.
Aff'g S. C., 27 *Ibid*, 476.
The Denmark, 27 *Ibid*, 141.
Green *vs.* Boston & Lowell R. R., 128 Mass., 221.

The validity of a similar clause in a telegraph blank was sustained in Primrose *vs.* Penn. R. R., 154 U. S., 1. At p. 15 the Hart case is quoted and approved.

The validity of a similar limitation in contracts for the carriage of passengers and their baggage is equally well settled.

Railroad Co. *vs.* Fraloff, 100 U. S., 24, 27.

There is no distinction on principle between these cases and the one at bar. They all rest on the solid foundation of allowing parties either by contract or notice to define the limit of an undefined liability. Market value is always an uncertain quantity. The place of ascertainment is often in doubt, and it must always rest on evidence as to quality, which the shipper alone can give; and which ordinarily the carrier cannot refute.

The passage money of the passenger is freight, and subject to the same rules as money paid for carrying cargo.

The Main, 152 U. S., 122.

These baggage cases are therefore in point.

Third.

It is equally well settled that the clauses printed on the back of the bill of lading in this case form a part of it, because they are, by express language, incorporated in it and are signed by the agents for respondent.

Petition for Certiorari, p. 2; Record p. 5, fol. 20; p. 10, fol. 39.

1. It is not to be supposed that the Courts intend to apply to carrier's contracts any different rule from that applicable to other contracts, so far as the question of what is to be treated as part of the contract is concerned.

It was formerly the practice not to include in the body of the mortgage the defeasance clause. The mortgage was an absolute deed with a defeasance endorsed upon it. No one would contend that in such case the defeasance, although endorsed, or contained in a separate instrument, would not be a part of the contract.

Harrison *vs.* Trustees, 12 Mass., 463.
Morgan's Assignee *vs.* Shinn, 15 Wall., 105.
Bell *vs.* Bruen, 1 How., 169, 183.
1 Greenl. Evid., Sect. 283.

So, if words expressing a delivery in escrow were endorsed upon a deed delivered with it, or embraced in another paper, can there be a doubt they would qualify the delivery?

Stanton *vs.* Miller, 58 N. Y., 192, 203.
County of Calhoun *vs.* American Emigrant Co., 93 U. S., 124.

If the carrier delivers to the shipper an instrument

which is evidently intended as a whole, and which is obviously not a mere receipt, but is intended to embody a statement of the entire terms of the contract, it seems irrelevant to the inquiry as to what the contract is, whether a particular clause is printed on the back or on the face.

The libellant cites expressions of Mr. Justice Davis in Railroad Co. *vs.* Manufacturing Co., 16 Wall., 318, to the effect that certain endorsements upon a carrier's receipt were not to be regarded. In that case the character of the instrument delivered by the carrier to the shipper was essentially different from that in this. It was a mere receipt, and not a contract. There was nothing in its character to indicate that the matter printed upon the back was an intrinsic part of the contract. Judge Davis draws special attention to the fact that it was not signed by the carrier, and calls it a mere notice.

In any case, that decision must be considered as overruled by this Court, in

Myrick *vs.* Michigan Central R. R. Co., 107 U. S., 102.

In this case the paper delivered to the shipper was a mere receipt for cattle "for transportation by the Michigan Central Railroad Company, to the warehouse at ." On the margin was the following:

"This receipt can be exchanged for through bill of lading.

NOTICE.—See rules of transportation on the back hereof."

On the back of the receipt the rules were printed, one of which (the 11th) contained a stipulation,

"The Company will not be liable or responsible for any loss, damage or injury to the property after the same shall have been sent from any warehouse or station of the Company."

At page 108 the Court say:

"Though this rule brought to knowledge of the shipper might not limit the liability imposed by a specific through contract, yet it would tend to rebut any inference of such a contract from the receipt of goods marked for a place beyond the road of the company."

The decision was followed and approved in

North Penn. R. R. *vs.* Commercial Bank, 123 U. S., 727.

This was a case arising upon the same bill of lading. but against a different carrier. In both cases the Court held that the carrier receiving the freight was not liable, but that the carrier at the terminus of the route was liable for non-delivery of the cattle. It is true that the Court also held that this would be the rule of law in the absence of any contract. But in determining what the contract between the parties actually was, the Court does consider and give weight to this endorsement upon the receipt for the cattle, and treat it as rebutting the inference from other language, upon the face of the contract itself. That is all we ask the Court to do in this case.

2. The bill of lading was issued after goods were shipped, but the shipping receipt expressed that the goods were received on the terms stated in the bill of lading. This of itself was sufficient to constitute a contract to carry on these terms.

Wilde *vs.* Merchants Desp. Trans. Co., 47 Iowa, 272.

But this question does not arise in the case at bar.

No issue is made by the pleadings on the acceptance of the bill of lading. It is alleged in the libel and was proved by the libellant. The contention in his brief, that there was no express evidence of his assent, is, therefore unwarranted by the pleadings, and cannot be made here.

3. Libellant cites expressions in the opinion in Ayres *vs.* Western R. R., to the effect that "an explicit agreement" on the part of the shipper must be proved. This decision is not controlling here.

(*a.*) This case was decided solely on the authority of Railroad Company *vs.* Manufacturing Co. That decision has since been limited as before shown, and never applied to limitations of amount.

(*b.*) The admission in the libel, and the statement in the shipping receipt that the goods were received subject to the conditions in the bill of lading, distinguish that case from the one at the bar.

Fourth.

It is equally well settled that a bill of lading delivered to the shipper expresses the contract between the parties, and that its terms are binding on both the shipper and the carrier, and that its acceptance by the shipper is conclusive evidence of his agreement to its terms.

York Co. *vs.* Central R. R., 3 Wall., 107.

In this case it was proved (p. 108) "that the cotton

was shipped on the steamer before the bills of lading were signed; that the shipper had not examined the bills; that his attention was not called to the fire clause, and that his firm had no authority to ship for their principals with that exemption." It was also argued that there was no consideration for the exemption. But the Court overruled all the objections, and held that the plaintiff, who was the owner of the goods, was bound by the exemption in the bill of lading.

Evidence of express assent by the shipper to the terms of the bill of lading is unnecessary. In the case at bar, Calderon does not testify that he did not read it, or did not know its terms. But if he had so testified, he would equally be bound by the contract.

York Co. *vs.* Central R. R., 3 Wall., 107.
Kirkland *vs.* Dinsmore, 62 N. Y., 171.
Farnham *vs.* Camden and Amboy R. R., 55 Penn., 53.
Belger *vs.* Dinsmore, 51 N. Y., 166.
Grace *vs.* Adams, 100 Mass., 505.

The Judges of the Court below did not differ as to any of the questions which have thus far been discussed. Judge Wallace's dissent was wholly on the construction of a particular clause in the bill of lading.

Fifth.

A mere question of the construction of a particular clause in a bill of lading is not one of gravity or importance. The terms of those instruments vary. They

are the subject of frequent discussion in commercial circles and are often changed. The fact that Judge Wallace dissented in the case at bar will lead to a change of the language of the clause in question.

If, however, the Court should consider this point on the present motion, we submit that the decision below was right.

Appellant argues that the clause in question means that the carrier should not be liable *in any amount* for a package worth over $100 "unless bills of lading are signed therefor, with the value therein expressed, and a special agreement is made."

1. If the clause did mean this it would still be valid. This was expressly adjudged by Mr. Justice Blatchford, in the Second Circuit, on appeal, and has twice been held in the District Court for the Southern District.

The Bermuda, 29 Fed. Rep., 399.
Aff'g S. C., 27 *Ibid*, 476.
The Denmark, 27 *Ibid*, 141.

2. But we cannot admit that the clause is open to the construction contended for. It provides that "the carrier shall not be liable for gold * *, or for goods of any description, which are above the value of $100 per package, unless," etc.

If gold, which is exempted by name, were put in the same package with other articles, no one would claim that the others were exempt. The gold only would be excluded. So when goods making the value over $100 are packed with goods of that value, the latter are not exempt. The former are.

Where goods are exempted by description, that description is exempt. When they are exempted by value, all over the value specified, are exempt. But how can

it be said that the parties intended to exempt goods which were worth less than the specified value?

The decree below charged the appellee with no liability for any goods in each package which were "above the value of $100 per package."

Sixth.

Harter Act.

The Carriers' Act of February 13, 1893, known as the Harter Act (27 Stat., 505), does not affect the validity of stipulations limiting the amount of recovery, or making it the duty of shippers to disclose the value, or character of goods. The object of all such clauses is to compel fairness on the part of the shipper. The "Carrier's reward ought to be proportionable to the risk."

Gibbon *vs.* Paynton, 4 Burr., 2298; cited and approved,

Hart *vs.* Penn. R. R. Co., 112 U. S., 331, 341.

The amount of this reward is not touched by the Harter Act, and, therefore, the amount of the recovery is not.

That Act was passed in order to establish beyond controversy the validity of certain clauses in bills of lading, and the invalidity of others. On these points there was a distressing conflict of authority which is now ended. There is nothing in its language or its history which tends to show that it was intended to abrogate the reasonable limitation of the amount of liability, in proportion to the risk and the reward.

Nothing can illustrate this proposition better than the Hart case. For the same Court which, in Railroad Co. *vs.* Lockwood, held a stipulation to be void which altogether exempted the carrier from liability for the negligence of his servants, in the Hart case sustained the validity of a limitation as to amount, although the loss in that case was caused by negligence.

Seventh.

Deviation.

The appellant argues that the clause in question does not apply to the case at bar, because the loss occurred after the steamer left Savanilla. To this we reply:

1. The recovery is not for a loss incurred by deviation, but for negligence in not making more thorough search for the goods at Savanilla.

Clause 9, of the bill of lading, allows goods to be over-carried. It was inserted with reference to the usual course of business to which reference has been had.

The necessities of proper stowage and distribution of a mixed cargo, and the frequent receipt of goods on the last day of sailing, cause goods to be sometimes necessarily so stowed as to be naturally overlooked or missed at the different ports of call. The ship being under the necessity of delivering mails and passengers with punctuality and despatch, and of avoiding delays that would be destructive to cargoes of perishable fruit, cannot overhaul all its cargo at every port of call.

All carrier's contracts are made with reference to the usage of the trade as to stowage.

Baxter *vs.* Leland, 1 Abb. Adm., 348.
The Colonel Ledyard, 1 Sprague, 530.
Barber *vs.* Brace, 3 Conn., 9, 13.

This is admitted in

The Delaware, 14 Wall., 579, 598, 606.

Usage in reference to the manner of delivery is binding upon both parties.

Richmond *vs.* Union Steamboat Co., 87 N. Y., 240.
Homesly *vs.* Elias, 66 N. C., 330.
Adams Ex. Co. *vs.* Darnell, 31 Ind., 20.
Salter *vs.* Kirkbride, 4 N. J. Law Rep., 223, 229.
McMasters *vs.* Penn. R. R., 69 Penn., 374.
The Tybee, 1 Woods, 358.
Hooper *vs.* Chicago & N. W. R. Co., 27 Wis., 81.
Whitehouse *vs.* Halstead, 90 Ill., 95.

It is also binding when it relates to the method of transportation.

Robertson *vs.* Nat. S. S. Co., 139 N. Y., 416.

In the case at bar, this usage explains clause 9, and shows that it was intended to allow just what happened here. The learned District Judge held that this clause did not constitute a defense because of the carrier's failure to prove diligence in searching for the goods at Savanilla. Assuming, for the argument, that this is a sufficient reply, it still proves that the recovery is because of the negligence and not because of the deviation.

2. The authorities as to recovery by the shipper, where there has been a deviation (with one exception, to be considered hereafter), do not touch the effect of clauses limiting the amount of recovery. They do not,

on principle. The reason of the decisions on the latter clauses, stated under the Second Point, are equally applicable to a loss from deviation. If the appellee had been notified of the actual value of these uniforms, it would have bestowed more care upon the search at Savanilla. All care involves expense, and for expense there should be a proportionate reward.

3. The only case cited for libellant on this point is

Ellis *vs.* Turner, 8 Term Rep., 531.

To this there are several replies:

a. The English cases on carriers decided during the last century, have been so modified by the recent decisions that they cannot be cited as authority.

b. In that case there was an express agreement to deliver at the first port of call, and an express and wilful refusal to deliver there. On these two grounds the decision is based.

c. In that case there was no written contract, but only a posted notice, never seen by plaintiff.

4. The argument was much pressed in the Court below, that the effect of the deviation was to vitiate the insurance. This, however, would depend upon the form of the policy. If libellant had insured the goods "with all liberties as per bill of lading," the goods would have been covered notwithstanding the failure to deliver them at Savanilla. This is not an uncommon form of insurance. There are numerous routes in which it is of great importance to the carrier to permit what this bill of lading permits, and it is a very simple matter for the shipper to obtain insurance policies, covering such contingencies, as will under these circumstances occasionally arise.

5. In the present case, especially, the limitation was reasonable. The ultimate cause of the loss was that the goods were offered for carriage, too late for proper stowage.

Eighth.

The motion for a certiorari should be denied.

EVERETT P. WHEELER,
Proctor and Advocate for Respondent.